No. 13,014

IN THE

United States Court of Appeals

For the Ninth Circuit

HENRY T. TANIMURA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment and decree (T.R. 30-32) of the District Court of the United States for the Northern District of California, Southern Division, in an action (T.R. 3-12) against appellant under the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Sections 1895 and 1896(b)).

Jurisdiction below was based on 50 U.S.C.A. Appendix Sections 1895, 1896(b) and 1896(c). Jurisdiction of this Court is conferred by 28 U.S.C.A. Section 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

(1) The Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

(2) Section 205 of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1895):

> "Recovery of damages: Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under Section 204 (section 1894 of this appendix) shall be liable to the person from whom he demands, accepts or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50.00, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceeds the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such

amount may be brought in any Federal, State, or territorial court of competent jurisdiction within one year after the date of such violation: Provided, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered."

(3) Section 206(b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1896(b)):

"Prohibition and enforcement: (b) Whenever in the judgment of the Housing Expeditor any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act (section 1881-1910 of this Appendix), or any regulation or order issued thereunder, the United States may make application to any Federal, State, or territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

STATEMENT OF THE CASE.

This is an action (T.R. 3-12 and 24) commenced in the name of the United States of America against Henry T. Tanimura, appellant, Charles S. Lee and Carol W. Lee for restitution of rent overcharges under Section 205(a) of the Emergency Price Control Act of 1942, as amended (U.S.C.A. Section 925(a)), and under Section 206(b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1896(b)) for treble damages under Section 205 of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix 1895) for all violations occurring within the one-year period prior to the commencement of the action and for an injunction restraining future violation under Section 206(b) of the Housing

and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1896(b)).

The answer (T.R. 13-16) of appellant denied generally the allegations of the complaint and set forth several specific defenses one of which (T.R. 16) was that the premises in question had become de-controlled housing accommodations by reason of its being a hotel on the effective date of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix Section 1892(c)(1)(A)). On filing his answer, appellant duly made demand for a trial by jury (T.R. 18-19) pursuant to Rule 38b. of the Federal Rules of Civil Procedure. Appellee thereafter moved (T.R. 19-23) the lower Court to strike appellant's demand for trial by jury, and upon a hearing (T.R. 34-39) of the motion, the motion to strike the jury demand was granted (T.R. 24).

Thereafter the cause was set for trial by Court and duly came to trial by Court before the Honorable Michael J. Roche (T.R. 25). Appellee moved to dismiss the action insofar as it sought relief under the Emergency Price Control Act of 1942, as amended, and to dismiss the action as against Charles S. Lee and Carol W. Lee for lack of service of summons and complaint (T.R. 26). Appellee's motions were granted (T.R. 26). Appellant moved the Court for trial by jury (T.R. 40), and the motion was denied (T.R. 40). Evidence both oral and documentary was introduced, the principal issue being whether the premises in issue were in fact a hotel and as such decontrolled housing accommodations. The cause was submitted and the Court rendered judgment for ap-

pellee and against appellant ordering restitution of all rent overcharges (T.R. 30-31) and in addition thereto single damages by way of penalty for all overcharges occurring within the one-year period prior to the commencement of the action (T.R. 32) and an injunction against future violations of the Housing and Rent Act of 1947, as amended (T.R. 30). This appeal is from said judgment and decree (T.R. 30-33).

ARGUMENT OF THE CASE.

THE SOLE QUESTION PRESENTED BY THIS APPEAL IS WHETHER THE LOWER COURT ERRED IN DENYING TO APPELLANT A TRIAL BY JURY OF SOME OR ALL OF THE ISSUES OF THIS CAUSE.

A. Refusal to grant a jury trial when a litigant is entitled to the same is reversible error.

The right to a trial by jury is preserved and determined by the Seventh Amendment to the Constitution of the United States. Refusal to grant a jury trial when a litigant is entitled to and duly demands the same is reversible error.

Lewis v. Times Publishing Co., 185 F. (2d) 457.

B. An action under Section 205 of the Housing and Rent Act of 1947, as amended, is an action at law involving a penalty.

An action seeking a forfeiture, punitive damages or penalty damages is one at law entitling a litigant to a trial by jury.

Hepner v. U.S., 213 U.S. 103, 115;
Vandevander v. U.S., 172 F. (2d) 100, 101;
Fontenat v. Accardo, 278 F. 871, 876.

An action under Section 205 of the Housing and Rent Act of 1947, as amended, supra, is an action to enforce a penalty.

U.S. v. Hart, 86 F. Supp. 787, 788-789;
U.S. v. Jepson, 90 F. Supp. 983, 984;
U.S. v. Friedland, 94 F. Supp. 721, 724.

Even the decisions which have denied to the defendant a jury trial recognize that an action to recover treble damages under Section 205 of the Housing and Rent Act of 1947, as amended, supra, involves a penalty.

U.S. v. Shaughnessy, 86 F. Supp. 175.

Likewise an action under Section 206(e) of the Emergency Price Control Act of 1942, as amended, to recover treble damages is an action to enforce a penalty.

Bowles v. Farmers Nat. Bank of Lebanon, Ky., 147 F. (2d) 425, 429;
Porter v. Warner Holding Co., 328 U.S. 395, 402.

There is a mandatory necessity of imposing damages under Section 205 of the Housing and Rent Act of 1947, as amended, supra, when the United States commences an action after a violation has occurred.

Mattox v. U.S., 187 F. (2d) 406, 408.

In that case, *Mattox v. U.S.,* supra, like the one now before the Court, the damages so imposed in favor of the United States under Section 205 of the Housing and Rent Act of 1947, as amended, in no way could be considered as compensation for any injury sustained

by the United States where there is a restitution order, likewise in that case like this one, which completely compensates the injured parties for all damages sustained.

In *Porter v. Warner Holding Co.,* supra, 328 U.S. 395, at pages 401-402, the Supreme Court clearly stated the legal nature of an action under Section 205(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. 925 (e) which for the purposes here involved is identical to Section 205 of the Housing and Rent Act of 1947, as amended, supra:

> "It is true that Section 205(e) authorizes an aggrieved purchaser or tenant to sue for damages on his own behalf; and if that person has not sued within the statutory period, or for any reason is not entitled to sue, the Administrator may institute an action for damages on behalf of the United States. To the extent that damages might be properly awarded by a court of equity in the exercise of its jurisdiction under Sec. 205(a), see *Veazie v. Williams,* 8 How. 134, 160, Sec. 205(e) supercedes that possibility and provides an exclusive remedy relative to damages. It establishes the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in nature of penalties. Moreover a court giving relief under Sec. 205(e) acts as a court of law rather than a court of equity. But with the exception of damages, Sec. 205(e) in no way conflicts with the jurisdiction of equity courts under Sec. 205(a) to issue whatever 'other order' may be necessary to vindicate the public interest * * *."

C. Joinder of a cause of action seeking treble damages under Section 205 of the Housing and Rent Act of 1947, as amended, with a cause of action seeking equitable relief under Section 206(b) of the Housing and Rent Act of 1947, as amended, cannot deprive the defendant of his right to a jury trial to all legal issues affecting the right to recover treble damages.

The following reported decisions, all by United States district courts, hold that where a penalty by way of treble damages is sought under the Act, the defendant is entitled to a trial by jury regardless of the fact that equitable relief was also sought under the Act.

U.S. v. Hart, supra, 86 F. Supp. 787, 788-789;

U.S. v. Stymish, 86 F. Supp. 999, 1000-1001;

U.S. v. Jepson, supra, 90 F. Supp. 983, 984-986;

U.S. v. Friedland, supra, 94 F. Supp. 721, 723-724;

U.S. v. Mesna, 11 F.R.D. Supp. No. 1 page 86, 87-88.

Appellant found only two reported decisions, likewise all by United States District Courts, denying a jury trial in a case like the one now before the Court.

U.S. v. Shaughnessy, supra, 86 F. Supp. 175;

Creedon v. Arielly, 8 F.R.D. 265, 268 (this decision involved an action under the Emergency Price Control Act of 1942, as amended).

It is admitted that there are many unreported decisions by United States district courts both granting and denying jury trials in a situation as is now before the Court.

Neither of the aforementioned decisions denying a jury trial cited or discussed *Porter v. Warner Holding Co., supra,* 328 U.S. 395, although all of the aforementioned decisions granting a jury trial, except *U.S. v. Stymish, supra,* cited *Porter v. Warner Holding Co., supra.*

It is appellant's position that those decisions granting a jury trial in a case like the one now before the Court are correct under the decided principles as to the right to a trial by jury. Under a unified system of administration of law as now exist in the Federal District Courts the distinctions between legal and equitable jurisdiction are no longer of great importance other than determining the right of trial by jury. But when the question arises as to the right to trial by jury as to some or all of the issues of a cause then those distinctions become important. This Court has stated the principle to be followed in determining the right of a jury trial in the decision of *Johnson v. Gardner,* 179 F. (2d) 114, 116-117:

> "The right to a jury trial in the domain or field of equity such as is here involved is determined by the issues of fact that are pleaded in the concrete suit and the type and quality of remedies that are applicable and available to the suitor. This has been the yardstick which has been applied under the ancient divisions of law and equity and the single civil action in the unified procedure under the federal rules."

To a similar effect:

Dimick v. Schiedt, 293 U.S. 473, 476;

The Honorable Charles E. Clark in his book, *Code Pleading,* second edition, at page 92.

Applying this principle the Supreme Court held in *Fleitman v. Welsback St. Lighting Co. of America,* 240 U.S. 27, 29, that in a suit seeking treble damages and equitable relief under the Sherman Anti-Trust Act that the defendant had an absolute right to trial by jury. In that decision the Supreme Court stated

> "When a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law."

Applying the same principle this Court held that penalty damages could not be given by a Court exercising equitable jurisdiction for it would result in a denial to the defendant of his right to trial by jury.

Connolly v. U.S., 149 F. (2d) 666, 669.

It is respectfully submitted that of the two lines of decisions by the United States District Courts, that line which grants a trial by jury in a cause as is now before the Court more correctly follows the established principles as to the right of trial by jury. If the reasoning of *U.S. v. Jepson, supra,* 90 F. Supp. 983, is not correct, then, it can only be concluded that under the unified procedure established by the Federal Rules of Civil Procedure there never could be as a matter of right a trial by jury if the complaint prayed some type of equitable relief. If such were the case plain-

tiff could always bar a defendant from securing a jury trial by merely praying some equitable relief in the complaint. The liberal joinder provisions of Rule 18 of the Federal Rules of Civil Procedure were never intended to deprive a litigant of his right to a jury trial and Rule 38a. so provides. This is substantially the position taken in *Bruckman v. Hollzer,* 152 F. (2d) 730, wherein this Court stated at page 732:

> "We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the others. The rules introduce the radical change in the federal practice of creating the jurisdiction in the district courts to hear and determine in a single suit equity claims, with a claim which theretofore should have a common law adjudication in a separate suit. We take it that it is to 'preserve' in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that rule 38a. provides: '(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' "

CONCLUSION.

For the reasons hereinabove stated the lower Court erred in refusing to grant to appellant a trial by jury of all issues affecting appellee's legal claim for treble damages, and that therefore the judgment and decree herein should be reversed with direction that those issues affecting that legal claim be first tried by jury before any judgment or decree shall be herein rendered.

Dated, San Francisco, California,
September 12, 1951.

Respectfully submitted,
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